

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2027

To be argued by: Mark S. Carlin

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 77-2027

ALBERT MASCOLO,
Appellant,

-VS-

UNITED STATES OF AMERICA,
Appellee.

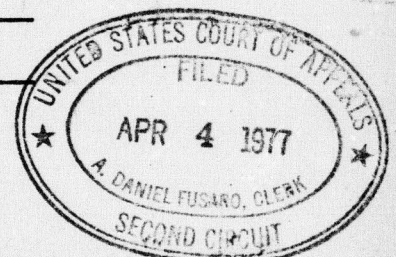
ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK
John R. Bartels, J.

BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS
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ALBERT MASCOLO,

Appellant,

-vs-

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

ISSUE PRESENTED

Did the court below err in failing to find that appellant Mascolo's sentence was imposed in violation of the due process clause of the Fifth Amendment to the United States Constitution and his sentence consequently invalid, because his presentence report contained material misinformation and false assumptions?

STATEMENT OF THE CASE

This is an appeal from an order dated December 9, 1976, of the United States District Court for the Eastern District of New York (Bartels, J.) denying petitioner-appellant Albert Mascolo's Motion to Vacate, Correct, or Set Aside Sentence pursuant to 28 U.S.C. §2255.

Mr. Mascolo was sentenced on June 8, 1973, to a term of five years incarceration and seven years special parole. Nearly three years later, on May 5, 1976, Mascolo moved the District Court to vacate, correct, or set aside his sentence for the reason that his presentence report used at sentencing contained material misinformation and prejudicial remarks and that therefore the sentence was imposed in violation of the due process clause of the Fifth Amendment to the United States Constitution. No hearing was held on the motion. By a memorandum decision and order dated December 9, 1976, the Honorable John R. Bartels denied the motion. A copy of Judge Bartel's memorandum decision and order is annexed hereto.

On February 4, 1977, Mascolo filed a timely notice of appeal to this Court.

STATEMENT OF FACTS

Mascolo and a co-defendant, Louis Epifania, were convicted on February 20, 1973, after a jury trial, of conspiracy to sell heroin and possession of heroin (72 Cr. 1220, E.D.N.Y.)^{1/}

On June 8, 1973, Mascolo was sentenced by the Honorable John R. Bartels of the United States District Court for the Eastern District of New York to a term of five years of incarceration, pursuant to 18 U.S.C. §4208(a)(2)(1958) [amended, Pub. L. 94-233, 90 Stat. 219, 222, March 15, 1976, current version at 18 U.S.C. §4205(b)(2)] and seven years of special parole to follow.^{2/} In setting sentence, Judge Bartels had before him a presentence report prepared pursuant to F.R.Cr. P. 32(c) (1966) (amended, Pub L. 94-64, 89 Stat. 370, 376, July 31, 1975).

Judge Bartels examined the presentence report and made specific reference to it during the sentencing proceeding. App. 15 (sentencing transcript). The presentence report was made available to Mascolo's counsel who, during the sentencing colloquy, disputed its characterization of Mascolo as a "high level courier" of heroin. App. 16-17.

1) This Court affirmed the conviction without opinion, 486 F. 2d 1397 (1973), cert. denied, 417 U.S. 909 (1974).

2) The memorandum decision incorrectly reports Mascolo's date of sentencing as June 8, 1972. App. 3.

Mascolo began serving his sentence in early August 1973.^{3/} Relying on the presentence report, the federal Bureau of Prisons kept him on maximum custody and denied him access to rehabilitative programs. The United States Board of Parole, also relying on the presentence report, classified him "Original Jurisdiction" and gave his parole application en banc consideration pursuant to 28 C.F.R. §2.17(a) (1974). In December 1974, after he had been improperly treated by the Bureau of Prisons and Board of Parole for sixteen months, Mascolo complained pro se to the United States District Court for the District of Connecticut that he was "being deprived of certain institutional benefits because of false and highly prejudicial material in his prison files linking him with acts of violence and designating him a member of organized crime." In the subsequent litigation, Mascolo established that the presentence report on which the sentencing judge, the Bureau of Prisons and the Board of Parole had relied contained misinformation and extraneous information, and thereby mischaracterized him. Mascolo v. Norton, 405 F. Supp. 523 (D. Conn. 1975). In ruling on Mascolo's amended petition for a writ of habeas corpus, United States District Judge Robert C. Zampano found that the source of the material about which Mascolo complained was his presentence report. The court found that the presentence report indicated that "Mascolo was a professional 'hit man,' had threatened a

3) Subsequently, Mascolo pleaded guilty to conspiracy to commit extortion and was sentenced to a concurrent term of three years' incarceration. (74 Cr. 934, S.D.N.Y., MacMahon, J.) The validity of this sentence has not been challenged.

government witness, and 'had been questioned about the shooting of Joseph Columbo's attempted assassin.' "4/After an investigation of Mascolo's claims, government counsel represented to the court that "Mascolo was not a member of organized crime, that the 'hit man' allegations were unsubstantiated, and that law enforcement agents were not aware of any evidence that Mascolo had been questioned in connection with the attempted murder of Joseph Columbo." Government counsel also attached corrective information to his prison files that so indicated. Judge Zampano verified the representations of government counsel by his own in camera examination of the presentence report and Mascolo's corrected prison files.^{5/}

As a result of Judge Zampano's findings of errors in the presentence report and Mascolo's own knowledge of its contents,^{6/} Mascolo moved to have his sentence vacated on May 5, 1976. That motion was denied below.

Mascolo was released on parole from the Federal Correctional Institution at Danbury, Connecticut in June, 1976. He will remain under parole supervision until 1985.

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- 4) 405 F. Supp. at 524. Judge Bartels released the presentence report to Judge Zampano for his inspection and use in the Mascolo v. Norton litigation.
 - 5) 405 F. Supp. at 525. Judge Zampano dismissed Mascolo's amended petition for a writ of habeas corpus as moot because of the corrective action which had been taken with respect to the errors in the presentence report and because Mascolo was granted the institutional benefits which he claimed had been unlawfully denied. Id.
 - 6) Counsel for Mascolo twice sought permission from Judge Bartels to inspect the presentence report during the Mascolo v. Norton litigation without success. Counsel was finally able to review the report in December 1975 when Judge Bartels authorized Judge Zampano to permit counsel to read the report in his chambers.

ARGUMENT

I. MASCOLO DEMONSTRATED THAT
HIS PRESENTENCE REPORT
CONTAINED MISINFORMATION AND
EXTRANEOUS INFORMATION AND,
TAKEN AS A WHOLE, CONVEYED A
FALSE IMPRESSION OF HIM.

The court below made no ruling on Mascolo's contention that the presentence report used at sentencing contained misinformation and extraneous information. Nevertheless, Mascolo's pleadings and supporting documents made out a prima facie case that the presentence report was infected with inaccuracies and unnecessary details.^{7/} It is significant in this regard that in Mascolo v. Norton, supra, 405 F. Supp. 523, the Government admitted that there were errors in the presentence report and, in the court below, it did not dispute Mascolo's contention concerning the contents of the presentence report. See, Government's Memorandum In Opposition To Petitioner's Request For Writ Of Habeas Corpus, Record 25-36.

In the court below, Mascolo complained of the inclusion in the presentence report of misinformation, i.e. the three recitations of a statement allegedly made by his co-defendant, Louis Epifania, to a government informant, Dennis Wieder, to the effect that Mascolo had 'hit' two unnamed

7) There was no evidentiary hearing on Mascolo's motion in which he could further document his claim.

individuals ("The Epifania-Wieder Conversation"), 8/
and extraneous information, i.e. the description of the

- 8) The three references to the alleged conversation appeared in the section of the presentence report describing the offense and Mascolo's participation in it. The report described a meeting of Epifania and Wieder and stated:

During their conversations, which centered on the narcotics investigation in progress, Epifania reportedly indicated that he knew that "Al" had performed two "hit" jobs for him, whereupon Epifania gestered [sic] with his index finger as if pulling a trigger. The latter then allegedly cautioned Wieder that if he ever found that Wieder was the informer he would have him killed. App. 5, quoting Presentence Report at 8.

In addition, according to Wieder, Epifania at one time advised him that [Mascolo] killed two people on Epifania's orders. Id., quoting Presentence Report at 10.

According to Wieder, [Mascolo] has also reportedly murdered two individuals on instructions from Epifania. Id., quoting Presentence Report at 13.

violent death of Michael Greco ("The Death of Michael Greco") 9/ and the reference to Mascolo's questioning by police about the killing of the alleged assailant of Joseph Columbo ("The Death of Johnson")^{10/} Taken as a whole, the presentence report portrayed Mascolo as a person who regularly commits violent crimes.

Mascolo objected in the court below that the inclusion of the Epifania-Weider conversation was harmful to him at sentencing because the murders ascribed to him never occurred. In his motion to vacate his sentence, Mascolo denied murdering the unnamed individuals mentioned in the Epifania-Wieder conversation or any other persons. Motion To Vacate, Correct, Or Set Aside Sentence, Record 6. Judge Zampano's findings in Mascolo v. Norton, supra, supported Mascolo's denials for, after examining the presentence report and the corrective information attached to Mascolo's prison files, Judge Zampano verified government counsel's representations that "the 'hit man' allegations were

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- 9) The presentence report described alleged narcotics transactions between Greco and Epifania and between Greco and John McMillan, an uncle of the government informant, and then stated:

Prosecution against Michael "Big Mike" Greco was abruptly halted in March 1973 when his dismembered body was delivered from Boston, Massachusetts, and deposited at an undisclosed location in New York City by as yet unknown individuals. The investigation of events surrounding his death continues. App. 5, quoting Presentence Report at 9.

- 10) The presentence report contained the following:

[Mascolo] further advises that at the time that Johnson was killed in connection with the attempted murder of Joseph Columbo, he was questioned by local police as a suspect. He advises, however, that he had a verifiable alibi and that the inquiry was not pursued in his direction. App. 6, quoting Presentence Report at 11.

unsubstantiated." 405 F. Supp. at 524 (emphasis added).

Mascolo also objected in the court below that the inclusion in the presentence report of the references to the deaths of Greco and Johnson created the impression that he was somehow involved in those incidents and thereby prejudiced him at sentencing. He pointed out that there was no mention in the report of any relationship between himself and Greco and no allegation that he was involved in Greco's killing. Memorandum In Support Of Motion To Vacate, Correct, Or Set Aside Sentence, Record 15. He further disclaimed any involvement in or knowledge of the circumstances of Greco's death.

Motion To Vacate, Correct, Or Set Aside Sentence, Record 6. ^{11/}

Mascolo argued that the statement concerning his having been questioned about the death of Johnson was included in the report even though he was never arrested in that matter, the investigation was never pursued in his direction, many other individuals were presumably questioned about the unsolved killing of Johnson, and "law enforcement agents were not aware of any evidence that [he] had been questioned in connection with the attempted murder of Joseph Columbo,"

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- 11) The court below faulted Mascolo for neither admitting nor denying the statement about Greco's death. See, App. 6. However, Mascolo had pointed out to the court that the statement was illogical on its face - "how can anyone know that Michael Greco's body was dismembered and was delivered from Boston, Massachusetts, when its location is 'undisclosed' and the individuals involved are 'unnamed'?" Memorandum In Support Of Motion To Vacate, Correct, Or Set Aside Sentence, Record 15 - and thus he could do no more than to deny knowledge of the circumstances of Greco's death.

Mascolo v. Norton, supra 405 F. Supp at 524. Memorandum In Support Of Motion To Vacate, Correct Or Set Aside Sentence, Record 16.

Mascolo thus adequately demonstrated that the presentence report used by Judge Bartels included misinformation in the form of allegations that he had committed two "hits", and extraneous information that unfairly implied that he was involved in two other violent incidents, in the form of the references to the death of Greco and his having been questioned about Johnson's death.

II. MASCOLO HAD THE RIGHT TO A
SENTENCING PROCEEDING FREE
OF MISINFORMATION AND EXTRANEUS
INFORMATION; A SENTENCE IMPOSED
IN VIOLATION OF THIS RIGHT IS
INVALID AND MUST BE VACATED.

When Mascolo came before the court on June 8, 1973, for sentencing, he had a right to a proceeding free of material information and false assumptions. The inclusion of the misinformation and extraneous information in the presentence report used by Judge Bartels at Mascolo's sentencing contravened the dictates of the due process clause of the Fifth Amendment to the United States Constitution and thus rendered his sentence invalid. Therefore, the District Court erred in failing to vacate his sentence.

Before imposing sentence, a federal trial judge "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." United States v. Tucker, 404 US 443, 446 (1972). Such an inquiry is justified by the theory of "individualized" sentencing and "the belief that by careful study of the lives and personalities of convicted offenders many [can] be less severely punished and restored sooner to complete freedom and useful citizenship." Williams v. New York, 337 US 241, 249 (1949). When he sentenced Mascolo, Judge Bartels could and did use a presentence report which contained material pertaining to Mascolo's character, obtained outside the courtroom from persons who were not subject to Mascolo's confrontation and cross-examination. See, Williams supra, at 246-251.

Judge Bartels was not, however, completely unrestricted as to the kinds and sources of information which he could use when sentencing Mascolo. Townsend v. Burke, 334 US 736 (1948), established that a sentence cannot be predicated on misinformation or misreading of court records.

[T]his prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law...
334 US at 741

In United States v. Tucker, supra, 404 US 443, the Court reaffirmed the Townsend rule that a sentence founded upon misinformation or mistaken assumptions is invalid as a violation of due process, 404 US at 447, and affirmed the Ninth Circuit's order of resentencing for a defendant whose sentence was based in part on prior unconstitutional convictions. Id. at 446, 449.

This Court has long recognized that "[f]air administration of justice demands that the sentencing judge will not act on surmise, misinformation and suspicion but will impose sentence with insight and understanding." United States v. Malcolm, 432 F. 2d 809, 819 (2d Cir. 1970). Thus the rule in this Circuit is:

Misinformation or misunderstanding that is materially untrue regarding a prior criminal record, or material false assumptions as to any fact relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process.
Id. at 816.

When the sentencing process does not comply with this standard, as in this case, and a defendant is evaluated on information and assumptions concerning his background and behavior which are untrue, the sentence thus imposed is invalid as a denial of due process. See, United States v. Rosner, Slip op. 1641, 1645 n. 3 (2d Cir. February 1, 1977); United States v. Robin, 545 F.2d 775, 779 (2d Cir. 1976); United States v. Stein, 544 F. 2d 96, 101-3 (2d Cir. 1976); United States v. Herndon, 525 F. 2d 208 (2d Cir. 1975); United States v. Needles, 472 F. 2d 652, 657 (2d Cir. 1973). Cf., United States v. Slutsky, 514 F. 2d 1222 (2d Cir. 1975) (mistake of law). In this case, Mascolo's presentence report contained prejudicial statements which Mascolo claims are untrue and unwarranted and which the government acknowledged were unsubstantiated. The allegations, though untrue, were so serious that they infected the presentence report and tainted the sentencing process.

The judiciary's concern about misinformation and false assumptions in the sentencing process is derived from the theory of "individualized" sentencing. Where "[t]he aim of the sentencing court is to acquire a thorough acquaintance with the character and history of the man before it," United States v. Doyle, 348 F. 2d 715, 721 (2d Cir.), cert. denied, 382 U.S. 843 (1965), courts must take pains to assure that defendants are sentenced on the basis of data which is probative of their character and not on the basis of invalid premises. "A rational penal system must have some concern for the probable accuracy of the informational inputs in the

sentencing process." United States v. Weston, 448 F.2d 626, 634 (9th Cir. 1971) Cf., Tarlton v. Saxbe, 507 F.2d 1116 (DC Cir. 1974); Menard v. Saxbe, 498 F. 2d 1017 (DC Cir. 1974) (both cases expressing concern about the accuracy of the FBI records system.)

The Supreme Court has manifested a concern for the evidential value of the informational inputs in the sentencing process. "[C]onsideration must be given to the quality, as well as the quantity, of the information on which the sentencing judge may rely." Gardner v. Florida, 45 U.S.L.W. 4275, 4278 (March 22, 1977) (plurality opinion per Stevens, J.) This concern was implicitly acknowledged as well in Townsend v. Burke, supra, and particularly in United States v. Tucker, supra. In Tucker, the Court banned an entire class of information -- unconstitutional prior convictions -- from presentence reports because they lack the probative value, with regard to criminal propensity, of convictions obtained in a constitutionally permissible manner. See, Coffee, The Future of Sentencing Reform: Emerging Issues in the Individualization of Justice, 73 Mich. L. Rev. 1361, 1430 (1975). See also, Williams v. Oklahoma, 358 U.S. 576, 584 (1959) (interpreting Williams v. New York, supra, as holding that a sentencing court can consider "responsible unsworn or 'out-of-court' information").

The Fourth Circuit has twice vacated sentences where the record failed to support factors on which the sentences rested, in recognition of the need for support for assumptions about a defendant's character. United States v. Looney, 501 F.2d 1039 (4th Cir. 1974); United States v. Powell, 487 F.2d 325 (4th Cir. 1973). Where there was a reference in a

presentence report to an allegation, which the defendant denied, that he had previously been charged with an offense and was not prosecuted because his father had reimbursed the victim, the Fourth Circuit vacated the sentence and held, "No conviction or criminal charge should be included in the report, or considered by the court, unless referable to an official record." Baker v. United States, 388 F. 2d 931, 934 (4th Cir. 1968). Accord, ABA Project on Standards for Criminal Justice, Standards Relating to Probation (Approved Draft, 1970) §2.3(ii)(B) and Commentary at 34, 37. See also, United States ex rel. Jackson v. Myers, 374 F.2d 707, 708 (3d Cir.1967) (magistrate's discharges can not be considered at sentencing).

In United States v. Pfingst, 477 F.2d 177 (2d Cir. 1973), this Court expressed concern about the probative value of reports of criminal investigations contained in a presentence report. Commenting that care should be taken when reporting investigations and other involvement in the criminal process short of adjudication, because of the danger of misleading the sentencing court, this Court noted that the attachment to a presentence report of letters describing SEC and IRS investigations was proper, but barely so. 477 F.2d at 192, citing ABA Standards Relating to Probation ^{12/} §2.3(ii)(B) and Commentary, supra.

12) Further evidence of this Court's skepticism about the use of nonprobative information is its adoption of prophylactic procedural devices to guard against the possibility of use of misinformation, See, e.g., United States v. Robin, supra, 545 F. 2d 775, 781-82; United States v. Rosner, 485 F. 2d 1213, 1231 (2d Cir. 1973), cert. denied, 414 US 950 (1974); United States v. Needles, supra, 472 F. 2d 652, 658. See also, F.R. Cr. P. 32(c)(3)(A)(1975).

Mascolo submits that his presentence report exceeded the bounds of what might properly have been contained in it. The sentencing process was thus marked by neither "insight and understanding," United States v. Malcolm, supra, 432 F. 2d at 819, nor the "informed discretion" of the court, United States v. Tucker, supra, 404 US at 447. Rather, the sentencing process was tainted by a presentence report which was utterly lacking in probative value about his character because it conveyed a false impression of him by its inclusion of misinformation and extraneous information. Indeed, his situation was not unlike that of Weston in United States v. Weston, supra, 448 F.2d 626, whose sentence was "based on unsworn evidence detailing otherwise unverified statements of a faceless informer that would not even support a search warrant or an arrest, and without any of the constitutional safeguards, that [she] is probably guilty of additional and far more serious crimes." 448 F. 2d at 631. In strong language, the Court of Appeals vacated Weston's sentence. "To us, there is something radically wrong with a system of justice that can produce such a result." Id. "[A] sentence cannot be predicated on information on so little value as that here involved." Id. at 634.

Infected with misinformation and extraneous information, Mascolo's presentence report was lacking in probative value; the sentencing procedure thus violated due process and the sentence was invalid. This case is distinguishable from other cases in this circuit which deal with the extent to which allegedly improper material may be taken into account by the sentencing judge --

United States v. Seijo, 537 F. 2d 694 (2d Cir. 1976);
United States v. Hendrix, 505 F. 2d 1233 (2d Cir. 1974);
United States v. Sweig, 454 F. 2d 181 (2d Cir. 1972);
United States v. Schipani, 435 F. 2d 26 (2d Cir. 1970), cert. denied, 401 US 983 (1971); and United States v. Doyle, supra, 348 F. 2d 715. In each of those cases, the sentencing court considered material which had much more probative value than the material in Mascolo's presentence report: in Seijo, it was claimed that the court relied on a witness' testimony which magnified the defendant's role in the offense, 537 F. 2d at 699-700; in Hendrix, the sentencing court was convinced beyond a reasonable doubt that the defendant had perjured himself as a witness, 505 F. 2d at 1236; in Sweig, the sentencing judge relied on evidence presented in court of counts on which the defendant was acquitted, 454 F. 2d at 184; in Schipani, the court considered evidence obtained in violation of the Fourth Amendment, 435 F. 2d at 27-28; and in Doyle, it was claimed that the court relied on counts of an indictment which were dropped in a plea bargain, 348 F. 2d at 721-22. Here, in contrast, there was not the judge's appraisal and use of trial circumstances and testimony as in Seijo, Hendrix; and Sweig, nor has there been the failure of Mascolo to dispute the accuracy of the material considered, as in Schipani and Doyle. See also, United States v. Bass, 535 F. 2d 110, 121 (DC Cir. 1976) (failure to dispute the accuracy of the material dispositive). Furthermore, the broad unexplained language in United States v. Cifarelli, 401 F. 2d 512, 514 (2d Cir.), cert. denied, 393 US 987 (1968), to the effect that crimes on which there has been no conviction may be considered in sentencing should

not be thought of as controlling. Examination of the briefs in Cifarelli reveals that the sentencing judge apparently indicated his belief that the defendant was involved in a large-scale "swindling operation" and then read a list of incriminating evidence that had been in the defendant's possession at the time of his arrest. There was accordingly in Cifarelli material of probative value considered by the sentencing court.

III. THE COURT BELOW APPLIED
AN INCORRECT STANDARD CONCERNING
RELIANCE ON THE DEFECTIVE PRESENTENCE
REPORT; FURTHERMORE, THE COURT'S
DISCLAIMER OF RELIANCE ON THE PRESENTENCE
REPORT IS UNAVAILABLE.

The lower court held that "an otherwise legal sentence is open to attack only if there has been explicit, demonstrated or otherwise clearly evidenced reliance on material and improper information" and then disclaimed any reliance on the defective presentence report. App. 9-10. See also, App. 4. The Court below stated an incorrect standard of reliance upon the presentence report. Also, the court's disclaimer conflicts with the theory of "individualized" sentencing which underlies criminal sanctions.

This Court has stated:

12/
Where there is a possibility
that sentence was imposed on the
basis of false information or false
assumptions concerning the defendant,
...the sentence will be vacated.

12) Actual reliance need not be shown...

United States v. Robin, supra, 545 F.
2d at 779 (emphasis added).

Accord, United States v. Rivera, 521 F. 2d 125, 129 (2d Cir. 1975); McGee v. United States, 462 F. 2d 243, 245-46, 247 (2d Cir. 1972). The District of Columbia Circuit recently remarked

in a similar vein:

Courts have not limited their focus to cases in which there was proven reliance on demonstrably false information...Rather, with increasing frequency, relief has been provided when the sentencing process created a significant possibility that misinformation infected the decision...

United States v. Bass, supra 535 F. 2d at 118.

Thus the standard applied by the District Court was incorrect.

Here, the inclusion of the misinformation and extraneous information in the presentence report compels the conclusion that the sentencing court relied upon this material. The presentence report is the principal instrument for the effectuation of the theory of "individualized" sentencing. Williams v. New York, supra, 337 US at 247-251. It is designed to provide the sentencing court with the "best available information," id. at 249, so that the court may have "a thorough acquaintance with the character and history of the man before it." United States v. Doyle, supra, 348 F. 2d at 721. Because "[c]onscientious judges need time for study and deliberation based on the best available information before imposing sentence and therefore place heavy reliance on the presentence report," United States v. Malcolm, supra, 432 F. 2d at 817-18, there was every indication that Judge Bartels would rely on the defective report when he sentenced Mascolo. See also, United States v. Robin, supra, 545 F. 2d 779-80.^{13/}

Footnote 13 on next page.

The court below's disclaimer of reliance on the presentence report flies in the face of the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime." Williams v. New York, 337 US at 247. See, United States v. Hendrix, supra, 505 F. 2d at 1236. The only conclusion to be drawn from the court's disclaimer is that the judge read the presentence report, but then disregarded it completely, and sentenced Mascolo only on the basis of his offense and not on the basis of his personal characteristics and prior history.

Though the use of a presentence report by the court was discretionary at the time Mascolo was sentenced, F.R.Cr.P. 32(c) (1966); United States v. Heng Awkak Roman, 484 F. 2d 1271 (2d Cir. 1971); United States v. Visconti, 261 F. 2d 215 (2d Cir. 1958); United States v. Schwenke, 221 F. 2d 256 (2d Cir. 1955), complete disregard of a presentence report "is somewhat troublesome, because this court has stressed the importance of the district court having unfettered access to any relevant information about the defendant..." United States v. Warren, 453 F. 2d 738, 743 (2d Cir. 1972). See, United

- 13) For the same reason, the misinformation and estraneous information contained in Mascolo's presentence report were "material," notwithstanding the District Court's protestations to the contrary. App. 7, 9. Judge Frankel has written for this Court, "Impressions about the individual being sentenced...are, for better or worse, central factors to be appraised under our theory of 'individualized' sentencing." United States v. Hendrix, supra, 505 F. 2d at 1236. Any bit of information or misinformation about the defendant's character is thus material to the sentencing process.

States v. Frazier, 479 F. 2d 983 (2d Cir. 1973); United States v. Manuella, 478 F. 2d 440 (2d Cir. 1973). Moreover, once having read the presentence report, the court must have been influenced by its contents.

IV. THE DISCLOSURE OF THE PRESENTENCE
REPORT TO MASCOLO'S COUNSEL DOES
NOT PRECLUDE RELIEF.

Prior to the sentencing proceeding, Mascolo's trial counsel inspected the presentence report, App.15, and in fact, he addressed most of his remarks at the sentencing to a particular aspect of the presentence report. App.16-17. He made no mention whatsoever of the recitations of the Epifania-Wieder conversation and the references to the death of Greco and the questioning of his client with regard to the death of Johnson. Nevertheless, counsel's failure to challenge the inclusion of these items in the presentence report does not now stand as a bar to vacating Mascolo's sentence, for the extent of counsel's participation in the sentencing is not the determinative factor when a defective presentence report is used.

In Townsend v. Burke, supra, 334 US 736, the defendant was not assisted by counsel. While important, the absence of counsel merely aggravated the true evil--sentencing on the basis of misinformation and false assumptions. As the Court concluded:

Consequently, on this record we conclude that, while disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design is inconsistent with due process of law...[I]t is the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process. 334 US at 740-41.

Commenting on Townsend, the Third Circuit stated, "The Supreme Court saw the wrong incurred as careless or designed sentencing on the basis of materially untrue facts and assumed that such injustice would normally be avoided by the presence of counsel." United States ex rel. Jackson v. Myers, supra, 374 F. 2d at 710. When counsel stands mute, for whatever reason, the wrong remains the same -- a defendant is sentenced on the basis of misinformation.

Mascolo may well have received effective assistance of counsel, as the District Court held. App. 7-9.^{14/} Nevertheless, that otherwise effective counsel failed to attempt to controvert the flawed presentence report does not now preclude the vindication of

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- 14) The effectiveness of Mascolo's trial counsel during the sentencing proceeding has never been an issue in this case. The District Court misinterpreted Mascolo's argument made below and renewed here with regard to his counsel's efforts at the sentencing. Mascolo did not contend that his sentence should be vacated because his counsel's failure to challenge the inclusion in the presentence report of the recitations of the Epifano-Wieder conversation and the references to the death of Greco and his questioning with regard to the death of Johnson constituted ineffective assistance of counsel. Rather, he maintained that counsel's failure to raise the issue should not now stand as a bar to the vindication of his Constitutional right not to be sentenced on the basis of misinformation and false assumptions. Mascolo cannot speculate as to why his counsel was silent on this point, as the District Court did, App. 9, but the Court is urged to note that Judge Bartels admonished counsel, "Don't waste my time," App. 15, and counsel thus could have felt constrained to limit his comments.

Mascolo's constitutional right not be sentenced on the basis of misinformation and false assumptions. Cf., Gardner v. Florida, supra, 45 U.S.L.W. at 4278 (failure of counsel to request confidential section of presentence report to which he was entitled does not constitute waiver of protections against unlawful imposition of death penalty). Such a result would defeat the purpose and rationale of the constitutional principle announced in Townsend. A sentence is still not based on insight and understanding, and the prejudicial and deleterious effect of a defective presentence report is not lessened, when misinformation and extraneous information is allowed to pass without investigation or rebuttal through the hands of counsel, as happened here.

Moreover, there is little that counsel could have done to counter the unfair characterization of Mascolo in the presentence report, had counsel raised the issue at sentencing. Errors of specific fact may be rebutted by reference to official records, but how could counsel have rebutted the vague charges of criminal activity implicit in the Mascolo's presentence report? See, Coffee, supra, 73 Mich. L. Rev. at 1425. Indeed, it would have been impossible for counsel to have proven a negative fact, i.e. that Mascolo did not commit the murders ascribed to him in the Epifania-Wieder conversation. See, United States v. Weston, supra, 448 F. 2d at 634. In Weston, counsel saw the erroneous material and was expressly afforded 120 days to controvert it; the court recognized that this would be an impossible task.

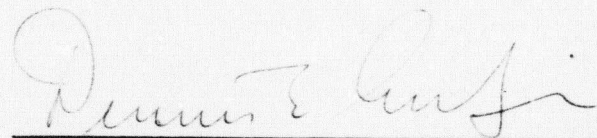
CONCLUSION

For all of the foregoing, the order of the District Court denying Mascolo's Motion to Vacate, Correct, or Set Aside Sentence should be reversed, his sentence should be vacated, and the case should be remanded for resentencing without use of the misinformation and extraneous information included in the defective presentence report.

Following the preferred practice, resentencing should be undertaken by a different judge. United States v. Robin, supra, 545 F. 2d at 782; United States v. Stein; supra, 544 F. 2d at 104; United States v. Rosner, supra, 485 F. 2d at 1231; United States v. Brown, 470 F. 2d 285, 288-89 (2d Cir. 1972).

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing brief and the attached appendix have been mailed, postage prepaid, to William C. Brown, Esq., Appellate Section, Criminal Division, Justice Department, c/o T. George Gilinsky, P.O. Box 899, Ben Franklin Station, Washington, D.C. 20044, this 31st day of March, 1977.

Mark S. Carlin